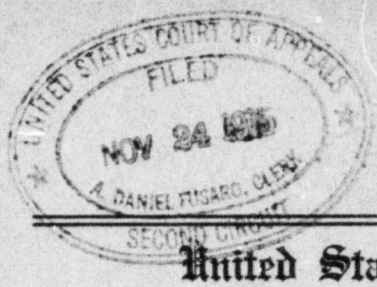
United States Court of Appeals

for the Second Circuit

APPELLEE'S SUPPLEMENTAL BRIEF



75-7287

To be argued by
LOUIS L. STANTON, JR.

United States Court of Appeals

For the Second Circuit

Docket Nos. 75-7287 and 75-7320

UNITED BANK LIMITED,
Plaintiff-Appellee,

against

COSMIC INTERNATIONAL, INC.,
Defendant.

JANATA BANK and AMIN JUTE MILLS, LTD.,
Plaintiffs-Appellants,

against

COSMIC INTERNATIONAL, INC. and
IRVING TRUST COMPANY,
Defendants.

NISHAT JUTE MILLS, LTD. and NATIONAL
BANK OF PAKISTAN,
Plaintiffs-Appellees,

against

COSMIC INTERNATIONAL, INC.,
Defendant.

SONALI BANK and NISHAT JUTE MILLS, LTD.,
Plaintiffs-Appellants,

against

IRVING TRUST COMPANY and
COSMIC INTERNATIONAL, INC.,
Defendants.

[Two of consolidated appeals Nos. 75-7287, 75-7320, 75-7325 and 75-7363.]

APPEAL OF THE DISTRICT COURT'S JUDGMENT

SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLEES UNITED BANK LIMITED, NATIONAL BANK OF PAKISTAN AND NISHAT JUTE MILLS, LTD. IN RESPONSE TO SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLANTS

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November 24, 1975

TABLE OF CONTENTS

Table of Authorities

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This supplemental brief is submitted on behalf of plaintiffs-appellees United Bank Limited, National Bank of Pakistan and Nishat Jute Mills, Ltd. in response to the supplemental brief of plaintiffs-appellants (the "Bangladesh plaintiffs") dated October 31, 1975.

The Bangladesh plaintiffs argue that this Court should give extra-territorial effect to the expropriation decrees because (i) the attempted expropriation in question constitutes a "wartime confiscation of enemy alien property by a belligerent party" (SB*1) and is therefore in accord with United States public policy, and (ii) the act of state doctrine precludes this Court from inquiring into the merits of the expropriation since the goods in the United States were security for debts seized in Bangladesh by the Bangladesh government under the expropriation decrees.

Neither contention has merit. Expropriation without compensation is contrary to our public policy, without exception for "wartime confiscations" by foreign governments. The act of state doctrine has never been applied to attempted seizures by a foreign state of property located outside of its territory.

ARGUMENT

I.

"Wartime confiscations" by foreign governments of property located inside our territory are totally inconsistent with United States public policy.

As noted in our main briefs,** our courts have uniformly denied effect to foreign decrees attempting to expropriate

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* "SB" refers to the Bangladesh plaintiffs' supplemental brief of October 31, 1975.

** United Bank Limited brief, pp. 8-9; National Bank of Pakistan brief, pp. 7-8.

property located within the United States at the time of the purported taking. The Bangladesh plaintiffs recognize that (SB 4). They now argue, however, that the expropriation decrees in issue here come within an exception to that rule—that they are "wartime confiscation[s] of enemy alien property by a belligerent party" (SB 1) and are therefore in conformity with United States public policy.

In support of their argument, the Bangladesh plaintiffs cite a line of cases in which the Supreme Court gave effect to laws enacted by the United States Congress pursuant to the war powers conferred upon it by the United States Constitution, art. I, § 8, cl. 11, seizing United States assets of enemy aliens during time of war (*e.g.*, the Trading with the Enemy Act, 50 U.S.C. App. § 1, *et seq.* (1970)). The Bangladesh plaintiffs argue that since our courts have upheld the constitutionality of the Trading with the Enemy Act (the "Act"), and similar laws permitting the wartime seizure of our enemies' assets which are located within the United States, the attempted Bangladesh expropriation of Pakistani property in issue here cannot be contrary to United States public policy.

Quite obviously, it is in our national interest, and therefore consonant with our public policy, to take all necessary measures to combat those with whom we are at war. That does not mean, however, that our courts must give effect to decrees of foreign governments which attempt to expropriate the property in the United States of citizens of friendly countries.

Furthermore, the Bangladesh plaintiffs would have this Court give broader effect—*i.e.*, extra-territorial effect—to the Bangladesh expropriation decrees than our courts have given to the Act and similar United States laws. Every case cited by the Bangladesh plaintiffs in support

of the proposition that our courts have recognized the right of the United States to confiscate enemy assets during wartime (SB 5-6) involved assets or debtors located within the United States.

Our courts have consistently construed the Act to authorize seizure of only those enemy assets located within the United States. See, *e.g., Propper* v. *Clark,* 337 U.S. 472 (1949); *Stadtmuller* v. *Miller,* 11 F.2d 732 (2d Cir. 1926); *von Clemm* v. *Smith,* 255 F.Supp. 353 (S.D.N.Y. 1965), *aff'd,* 363 F.2d 19 (2d Cir.), *cert. denied,* 385 U.S. 975 (1966); *In re Huga,* 155 N.Y.S.2d 987 (Sup. Ct., N.Y. County 1956).

Propper v. *Clark* was an action by the United States attorney general, as successor to the alien property custodian, to compel payment to him of a debt owed by an association located in the United States to a foreign association. The debt had been previously vested in the alien property custodian pursuant to the Act. The Supreme Court described the purpose of the Act as follows:

> "Through the Trading with the Enemy Act, in its various forms, the nation sought to deprive enemies, actual or potential, of the opportunity to secure advantages to themselves or to perpetrate wrongs against the United States or its citizens *through the use of assets that happened to be in this country.*" (emphasis added) 337 U.S. at 481.

This Court, in *Stadtmuller* v. *Miller,* described the purpose of the Act in like terms:

> "We concede that the intention [of the Act] was to make it impossible to aid the enemy (Germany) by forbidding that money or property of any kind *held in the United States* should reach the hands of the enemy." (emphasis added) 11 F.2d at 733-34.

Our state courts have given the Act the same application. *In re Huga* dealt with the issue whether a vesting order issued under the Act could vest in the alien property custodian certain assets not physically located in the United States. The court held it could not:

> "With respect to the first issue, it is held that the provisions of the Trading with the Enemy Act, as made applicable to Japan and her nationals by Executive Order No. 8389 of the President, on July 26, 1941, were not intended to apply to assets or property of any kind not physically located within the boundaries of the United States as defined in section 5 of said order. The purpose of the act has been clearly described in that respect:
>
> > 'Through the Trading with the Enemy Act, in its various forms, the nation sought to deprive enemies, actual or potential, of the opportunity to secure advantages to themselves or to perpetrate wrongs against the United States or its citizens through the use of assets that happened to be in this country.' Propper v. Clark, 337 U.S. 472, 481, 69 S.Ct. 1333, 1339, 93 L.Ed. 1480.
>
> That the purpose of that act is so limited seems also to be indicated by the language of section 6 thereof which specifies the duties and powers of the Alien Property Custodian. The Custodian is given power 'to receive all money and property *in the United States* due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned, or delivered to said custodian under the provisions of this Act'." (emphasis in original) 155 N.Y.S. 2d at 993-94.

The single case cited by the Bangladesh plaintiffs in support of their contention (SB 5) that the Act "has been deemed to have world-wide application"—*Cities Service Co.* v. *McGrath*, 342 U.S. 330 (1952)—does not support their argument. *Cities Service* was an action by the United States attorney general to enforce payment to him of two negotiable debentures payable to bearer. The executive order authorized the attorney general to vest property located "within the United States" owned by a specified enemy country or national thereof (342 U.S. at 332, fn. 6). The district court granted summary judgment for the defendant on the ground that the attorney general had exceeded his authority since the debenture certificates were outside this country at the time of vesting. This Court reversed, holding that the Act authorized the seizure of such obligations since the obligor, Cities Service Company, was located within the United States and the obligation could be enforced through the exercise of jurisdiction over it. The Supreme Court affirmed. 342 U.S. at 334.

Thus, our policy does not contemplate that our wartime confiscations reach assets outside the United States. There is no reason the Bangladesh plaintiffs should expect their expropriation decrees will be given extra-territorial effect here.

II.

The act of state doctrine does not require this court to give extra-territorial effect to the Bangladesh expropriation decrees.

The Bangladesh plaintiffs argue that even if the expropriation decrees violate our public policy, this Court is required to give effect to those decrees under the act of state doctrine. They reason that the expropriation decrees

confiscated the debts of Amin Jute Mills, Ltd. to United Bank Limited and of Nishat Jute Mills, Ltd. to National Bank of Pakistan and that the security for those debts—including the goods and the proceeds thereof which are at issue here—was automatically likewise confiscated, wherever it might be. This argument will not withstand analysis.

First, the Bangladesh plaintiffs have not demonstrated that either Amin Jute Mills, Ltd. or Nishat Jute Mills, Ltd. was sufficiently present in Bangladesh at the time of the confiscation to confer upon Bangladesh the power to enforce and collect their debts to the banks. As the District Court found (392 F.Supp. 262, 265, fn. 2; JA 40), the parties stipulated that Amin Jute Mills, Ltd. is a viable corporate entity existing under the laws of Pakistan; a large majority of its shares is held in Pakistan; at least seven of its nine directors are citizens and residents of Pakistan, and only one of Bangladesh; and all of its business and affairs (save the portion in Bangladesh at the time of the nationalizing act) is under the control of its directors in Pakistan (JA 47-48). The parties also stipulated that Nishat Jute Mills, Ltd. was incorporated under the laws of Pakistan and at all times maintained its head office and registered office in Karachi, Pakistan (JA 139-40). The Bangladesh plaintiffs now concede that "Both companies [are] controlled by West Pakistanis" (SB 2). Furthermore, it was stipulated (JA 51-52, 141), and the District Court found (392 F.Supp. at 264-65; JA 24-26), that the proceeds at issue here were to be remitted to the respective Karachi, Pakistan offices of United Bank Limited and National Bank of Pakistan and that each bank had the right to retain for its own use the proceeds remitted to it and reduce the jute mill's indebtedness accordingly.

Second, the Bangladesh plaintiffs cite no valid authority for the proposition that where a foreign government expropriates a debt located within the territory controlled by it, any assets located outside of that country's territorial control which are security for the debt also pass to that country. The cases relied upon by the Bangladesh plaintiffs (SB 9) deal either with the scope of voluntary assignments for consideration (*Brainerd, Shaler & Hall Quarry Co.* v. *Brice*, 250 U.S. 229 (1919); *Stillman* v. *Northrup*, 109 N.Y. 473, 17 N.E. 379 (1888)) or the effect of a foreign government's cancellation of insurance contracts issued to that country's nationals and expressly governed by that country's law (*Dougherty* v. *Equitable Life Assur. Soc'y*, 266 N.Y. 71, 193 N.E. 897 (1934)).

Fundamentally, the Bangladesh plaintiffs are seeking extra-territorial effect for their expropriation decrees—something our courts have consistently refused to allow. As this Court stated in *Menendez* v. *Saks & Co.*, 485 F.2d 1355, 1361, fn. 4 (2d Cir. 1973), *cert. granted sub nom. Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 416 U.S. 981 (1974):

> "The act of state doctrine has never been applied to attempted seizures by a foreign state of property located outside of its territory."

The issue raised by the Bangladesh plaintiffs is analogous to the question whether a foreign government's expropriation of business assets located within its territory includes United States trademarks relating to products of the expropriated manufacturer. Our courts have consistently refused to give effect to attempts by foreign governments to confiscate such property interests located in the United States. See, *e.g.*, *Baglin* v. *Cusenier Co.*, 221 U.S. 580 (1911); *Zwack* v. *Kraus Bros. & Co.*, 237 F.2d

255 (2d Cir. 1956); *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 293 F.Supp. 892 (S.D.N.Y. 1968), *modified on other grounds,* 433 F.2d 686 (2d Cir. 1970), *cert. denied,* 403 U.S. 905 (1971).

In *Zwack,* this Court, while not questioning the power of the government of Hungary to confiscate certain partnership assets located within that country, refused to give effect to Hungary's attempt to confiscate the United States trademarks relating to goods manufactured by the partnership:

> "We think that, where firm assets existing in the forum are concerned, technical considerations as to the manner in which the foreign state seeks to expropriate them are not controlling. . . . It is clear that the Hungarian government could not directly seize the assets which have a situs in the state of the forum. To allow it to do so indirectly through confiscation of firm ownership would be to give its decree extraterritorial effect and thereby emasculate the public policy of the forum against confiscation. This we decline to do." 237 F.2d at 259.

As stated in *Tabacalera Severiano Jorge, S.A.* v. *Standard Cigar Co.,* 392 F.2d 706, 715-6 (5th Cir.), *cert. denied,* 393 U.S. 924 (1968):

> "The underlying thought expressed in all of the cases touching on the Act of State Doctrine is a common-sense one. It is that when a foreign government performs an act of state which is an accomplished fact, that is when it has the parties and the *res* before it and acts in such a manner as to change the relationship between the parties touching the *res,* it would be an affront to such foreign govern-

ment for courts of the United States to hold that such act was a nullity. Furthermore, it is plain that the decisions took into consideration the realization that in most situations there was nothing the United States courts could do about it in any event.

In the case before us, it cannot be doubted that whatever may be the ordinary concept of the situs of a debt, the government of Cuba was not physically in a position to perform a *fait accompli* in the nature of the acquisition by the Cuban government or its interventor of the money owed to Tabacalera by Standard Cigar Company. It was simply not within the power of Cuba to accomplish this result. To this extent, we think it clear that whatever efforts were made by the Cuban government dealing with Tabacalera, these acts are to be recognized under the Act of State Doctrine only insofar as they were able to come to complete fruition within the dominion of the Cuban government. As to the other matters we conclude that they were not a 'taking of property *within its own territory*' within the language used by the Supreme Court in *Sabbatino*."

Summary

The goods involved in these cases were shipped out of East Pakistan (now Bangladesh) and were received and sold in the United States before the enactment of the Bangladesh expropriation decrees. The obligations of the New York importer to pay for those goods have always been located in the United States. The proceeds in question, presently on deposit with New York banks, were to be remitted to the Karachi, Pakistan offices of United Bank

Limited and National Bank of Pakistan. The Bangladesh government has never had jurisdiction over, or physical control of, any of the goods, obligations to pay for such goods or proceeds of sales involved in these cases.

This Court should affirm the District Court's award of the proceeds in question to United Bank Limited and National Bank of Pakistan.

Dated: New York, New York
November 24, 1975

Respectfully submitted,

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